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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 DEREK A. CAPOZZI, ) Case No. EDCV 10-0239-AHM (DTB)  
12 Plaintiff, )  
13 vs. ) **ORDER RE: MOTION FOR**  
14 WARDEN NORTON, et al., ) **PERMISSION TO FILE ONE**  
15 Defendants. ) **ORIGINAL AND ONE COPY OF**  
16 ) **SECOND AMENDED COMPLAINT;**  
17 ) **ORDER RE: MOTION TO SEAL;**  
18 ) **AND ORDER DISMISSING SECOND**  
 ) **AMENDED COMPLAINT WITH**  
 ) **LEAVE TO AMEND [DOCKET NOS.**  
 ) **32 & 33]**

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20 Currently pending before the Court are plaintiff's "Motion to Seal and Impound  
21 2<sup>nd</sup> Amended Complaint and for Court Order and to Seal Attached Affidavit"  
22 ("Motion to Seal") and "Motion for Permission to File One Original Copy of  
23 Attached 2<sup>nd</sup> Amended Complaint and for a Return Copy Provided to Plaintiff"  
24 ("Motion for Permission"), both of which were filed on December 3, 2010. On the  
25 same date, plaintiff also lodged a copy of the proposed Second Amended Complaint  
26 ("SAC") and a supporting Affidavit ("Affidavit") signed by plaintiff under penalty  
27 of perjury. The gravamen of plaintiff's claims remains essentially the same, to wit,  
28 that plaintiff suffered life-threatening injuries as a result of an assault and stabbing  
by another inmate while incarcerated at the United States Penitentiary in Adelanto,

1 California (“USP-Victorville”). (SAC at 15-16.) Named as defendants in the SAC  
 2 are various employees of the Federal Bureau of Prisons (“BOP”) at USP-Victorville.  
 3 (SAC at 4.) The SAC is silent as to the capacities in which the defendants are sued.  
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### 5 PROCEEDINGS

6 Plaintiff, a federal inmate currently incarcerated at the United States  
 7 Penitentiary in Lewisburg, Pennsylvania, filed a pro se civil rights action herein on  
 8 February 25, 2010 (“Complaint”). The Complaint was styled as a civil rights  
 9 complaint, although it was brought pursuant to the Federal Tort Claims Act  
 10 (“FTCA”).

11 On March 3, 2010, after its initial screening, the Court dismissed the Complaint  
 12 with leave to amend, on the ground that the allegations of the Complaint were  
 13 insufficient as plaintiff had failed to allege whether his claims against defendants  
 14 were made in their official or individual capacity. On March 26, 2010, plaintiff filed  
 15 his First Amended Complaint (“FAC”). After screening the FAC, on April 6, 2010,  
 16 the Court dismissed the FAC with leave to amend on the ground that the allegations  
 17 were insufficient to state a federal civil rights claim against defendants in their  
 18 official capacities. Thereafter, on April 26, 2010, the District Court issued an Order  
 19 dismissing the action without prejudice for failure to prosecute. On May 24, 2010,  
 20 plaintiff filed a document entitled, “Motion to Reconsider the Court’s April 26, 2010  
 21 Order Re Dismissal of Action for Failure to Prosecute” (“Motion for  
 22 Reconsideration”). On May 28, 2010, the Court granted the Motion for  
 23 Reconsideration, and vacated the Order dismissing the action for failure to prosecute.

24 After plaintiff failed to file a Second Amended Complaint, on August 6, 2010,  
 25 the Court issued a Report and Recommendation (“R&R”) recommending the  
 26 dismissal of this action with prejudice for failure to prosecute. On August 10, 2010,  
 27 plaintiff filed a “Request for Status of Motion Filed May 25 to Extend Time for Filing  
 28 of 2<sup>nd</sup> Amend. Complaint and for Clarification . . . and Whether or not Court did or

1 did not Receive or Rule on Said Motion,” which by Order, the Court construed as a  
 2 Request for Extension of Time to file a Second Amended Complaint. On August 17,  
 3 2010, the Court granted the Request, vacated the R&R, and ordered plaintiff to file  
 4 a Second Amended Complaint. On September 13, 2010, plaintiff filed a Second  
 5 Amended Complaint. However, because the amended complaint failed to comply  
 6 with Fed. R. Civ. P. 10, the complaint was stricken from the record pursuant to this  
 7 Court’s Order on September 21, 2010.

8 As noted above, plaintiff filed the instant Motion to Seal and Motion for  
 9 Permission on December 3, 2010, along with the proposed SAC.

10 For the reasons discussed hereafter, plaintiff’s Motion to Seal is granted in part  
 11 and denied in part and the Motion for Permission is granted. Further, the SAC must  
 12 be dismissed with leave to amend for failure to state a claim upon which relief can be  
 13 granted.

## 14 15 DISCUSSION

### 16 **I. Plaintiff’s SAC and supporting Affidavit shall be filed under seal.**

17 Generally, there exists a common law right of access to judicial records and  
 18 documents in civil proceedings. See Hagestad v. Tragesser, 49 F.3d 1430, 1433-34  
 19 (9th Cir. 1995). However, this right is not absolute and the court has the authority to  
 20 exercise its discretion in determining whether access is appropriate. See Nixon v.  
 21 Warner Communications, Inc., 435 U.S. 589, 598-99, 98 S. Ct. 1306, 55 L. Ed. 2d  
 22 570 (1978). A party seeking to seal a judicial record must demonstrate a compelling  
 23 reason supported by specific factual findings for overcoming the presumption  
 24 favoring access to the record. Kamakana v. City & Cnty. of Honolulu, 447 F.3d  
 25 1172, 1178 (9th Cir. 2006). In turn, the court should consider the competing interests  
 26 of the public and the party seeking to keep a judicial record secret. Id. at 1179.  
 27 Compelling reasons sufficient to outweigh the public interest in disclosure and justify  
 28 sealing the judicial record exist “when such court files might have become a vehicle

1 for improper purposes, such as the use of records to gratify public spite, promote  
2 public scandal, circulate libelous statements, or release trade secrets.” Id. (internal  
3 quotation marks and citations omitted). “The mere fact that the production of records  
4 may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation  
5 will not, without more, compel the court to seal its records.” Id.

6 In the present case, plaintiff alleges, under penalty of perjury, that by filing the  
7 SAC, he has been “forced to openly disclose information about certain individuals  
8 which places [his] life in absolute and certain exposure to summarily being  
9 murdered.” (Affidavit at 1-2.) Indeed, as noted, the gravamen of plaintiff’s claims  
10 arises out of an incident in which plaintiff was severely beaten and stabbed while in  
11 federal prison. Without further detailing plaintiff’s allegations, and being mindful of  
12 plaintiff’s concerns regarding further injury and/or retaliation, the Court concludes  
13 that, considering the foregoing legal principles, as well as plaintiff’s allegations,  
14 sealing plaintiff’s SAC and the supporting Affidavit is justified under the  
15 circumstances. See Nursing Home Pension Fund v. Oracle Corp., No. C01-00988  
16 MJJ, 2007 WL 3232267, at \*2 (N.D. Cal. Nov. 1, 2007) (concluding that the  
17 protection of confidential witnesses’ private information justified sealing certain  
18 documents because such witnesses “can be susceptible to retaliation and  
19 harassment”).

20 As such, the Court grants the Motion to Seal the SAC and the supporting  
21 Affidavit. However, to the extent plaintiff also seeks an order restricting defendants  
22 from “possessing, distributing, copying or showing any person, or person(s)” a copy  
23 of the SAC, this request is denied as moot. (See Motion to Seal at 2.) As explained  
24 below, the SAC must be dismissed with leave to amend because the allegations are  
25 insufficient to state a claim for relief. As such, to the extent plaintiff files a Third  
26 Amended Complaint, he may also seek to renew this request at that time.

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1 **II. Plaintiff is excused from submitting an additional copy of his SAC.**

2 In his Motion for Permission, plaintiff requests permission to submit a single  
3 copy of his SAC rather than three copies. Pursuant to Local Rule 11-4.1, plaintiff  
4 was required to submit this original SAC and one copy. It appears plaintiff complied  
5 with this requirement.

6 Plaintiff also requests a conformed copy of his proposed SAC. Under Local  
7 Rule 11-4.5, if a party presenting a document for filing in a paper format requests a  
8 conformed copy, an extra copy shall be submitted by the party for that purpose,  
9 which, in this instance, plaintiff did not do. Nevertheless, considering plaintiff's  
10 allegations of potential harm, the Court concludes that plaintiff has provided an  
11 adequate justification for failing to submit this additional copy of the SAC. As such,  
12 the Court shall provide him the requested copy. In the interest of protecting  
13 plaintiff's identity, however, before sending plaintiff a copy of his SAC, plaintiff  
14 shall notify the Court whether he still requests this copy. The Court also advises  
15 plaintiff that pursuant to Local Rule 11-4.5, plaintiff also was required to provide a  
16 postage-paid, self-addressed envelope for the purpose of sending a copy of the SAC  
17 to him, which it appears he did not do. In the future, plaintiff must comply with this  
18 requirement.

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20 **III. The SAC must be dismissed with leave to amend.**

21 Under the terms of the "Prison Litigation Reform Act of 1995," the Court is  
22 required to dismiss a complaint at any time if the Court determines that the action is  
23 frivolous or malicious; fails to state a claim on which relief may be granted; or seeks  
24 monetary relief against a defendant who is immune from such relief. See 28 U.S.C.  
25 §§ 1915(e)(2), 1915A(b); see also 42 U.S.C. § 1997e(c)(1).

26 The Court's screening of the SAC under the foregoing statutes is governed by  
27 the following standards. A complaint may be dismissed as a matter of law for failure  
28 to state a claim for two reasons: (1) Lack of a cognizable legal theory; or (2)

insufficient facts under a cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (as amended). In determining whether a complaint states a claim on which relief may be granted, allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. See Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1990) (as amended). Moreover, since plaintiff is appearing pro se, the Court must construe the allegations of the SAC liberally and must afford plaintiff the benefit of any doubt. See Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988). However, "the liberal pleading standard . . . applies only to a plaintiff's factual allegations." Neitzke v. Williams, 490 U.S. 319, 330 n.9, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989), superseded by statute on other grounds as stated in Lopez v. Smith, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc). "[A] liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." Bruns v. Nat'l Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir.1982)).

Pursuant to Fed. R. Civ. P. 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." As the Supreme Court has held, Rule 8(a) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 n.3, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Further, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level." See id. at 555 (internal citations omitted); see also Ashcroft v. Iqbal, \_\_ U.S. \_\_, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Thus, plaintiff must allege a minimum factual and legal basis for each claim that is sufficient to give each defendant fair notice of what plaintiff's claims are and the grounds upon which they rest. See, e.g., Brazil v. U.S. Dep't of the Navy, 66 F.3d 193, 199 (9th Cir. 1995); McKeever v.

1 Block, 932 F.2d 795, 798 (9th Cir. 1991). Moreover, failure to comply with Rule 8(a)  
 2 constitutes an independent basis for dismissal of a complaint that applies even if the  
 3 claims in a complaint are not found to be wholly without merit. See McHenry v.  
 4 Renne, 84 F.3d 1172, 1179 (9th Cir. 1996); Nevijel v. N. Coast Life Ins. Co., 651  
 5 F.2d 671, 673 (9th Cir. 1981).

6 After careful review and consideration of the SAC under the relevant standards,  
 7 the Court finds that its allegations are insufficient to state a claim. While the Court  
 8 believes that, based on the allegations of the SAC, the plaintiff may be able to state  
 9 a cause of action, as currently plead, the SAC is deficient on its face. As such, the  
 10 Court will afford plaintiff the opportunity to attempt to cure the deficiencies. See  
 11 Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987) (holding that a pro se litigant  
 12 must be given leave to amend his complaint unless it is absolutely clear that the  
 13 deficiencies of the complaint cannot be cured by amendment).

14  
 15 A. Plaintiff's SAC is currently styled as a FTCA action.

16 The SAC is currently styled as a complaint for civil damages under the FTCA.  
 17 The FTCA provides that the United States may be held liable for "personal injury or  
 18 death caused by the negligent or wrongful act or omission of any employee of the  
 19 Government while acting within the scope of his office or employment, under  
 20 circumstances where the United States, if a private person, would be held liable to the  
 21 claimant in accordance with the law of the place where the action or omission  
 22 occurred." 28 U.S.C. § 1346(b)(1). However, the United States is the only proper  
 23 defendant in a suit brought pursuant to the FTCA. F.D.I.C. v. Craft, 157 F.3d 697,  
 24 706 (9th Cir. 1998) (per curiam); see also Kennedy v. U.S. Postal Serv., 145 F.3d  
 25 1077, 1078 (9th Cir. 1998) (per curiam) ("[T]he United States is the only proper party

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1 defendant in an FTCA action.”). As such, to the extent plaintiff seeks to allege a  
 2 violation under the FTCA, his claims under this Act must be directed to the United  
 3 States alone.<sup>1</sup>

4  
 5 B. Plaintiff has not sufficiently alleged a violation under Bivens.<sup>2</sup>

6 Based on the allegations of the SAC, it appears plaintiff also may be attempting  
 7 to assert a Bivens action based on an alleged constitutional violation against the  
 8 defendant BOP employees.

9 Under Bivens, the Supreme Court recognizes a private action for damages  
 10 where federal officers are alleged to have violated a citizen’s constitutional rights.  
 11 See Corr. Services Corp. v. Malesko, 534 U.S. 61, 66, 122 S. Ct. 515, 151 L. Ed. 2d  
 12 456 (2001); W. Ctr. for Journalism v. Cederquist, 235 F.3d 1153, 1156 (9th Cir.  
 13 2000) (per curiam) (Bivens provides that “federal courts have the inherent authority  
 14 to award damages against federal officials to compensate plaintiffs for violations of  
 15 their constitutional rights.”). As noted, pursuant to Fed. R. Civ. P. 8(a)(2), plaintiff’s  
 16 allegations must contain a short and plain statement of the claim showing that he is  
 17 entitled to relief, including providing defendants fair notice of what the claim is and  
 18 the grounds upon which it rests. Bell, 550 U.S. at 555. As currently pled, plaintiff’s  
 19 allegations are insufficient to meet this requirement, including providing defendants  
 20 with notice of the alleged constitutional violation, such as a violation of his Eighth  
 21 Amendment rights.

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 25 <sup>1</sup> It is unclear from the SAC whether the United States was named as a  
 26 defendant in the SAC. To the extent plaintiff files a Third Amended Complaint, he  
 must specifically identify the named defendants.

27 <sup>2</sup> Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403  
 28 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).



1 Additionally, as previously explained, a Bivens action for damages will not lie  
 2 against the United States, agencies of the United States, or federal agents in their  
 3 official capacity. F.D.I.C. v. Meyer, 510 U.S. 471, 485-86, 114 S. Ct. 996, 127 L. Ed.  
 4 2d 308 (1994); see also Ibrahim v. Dep't of Homeland Sec., 538 F.3d 1250, 1257 (9th  
 5 Cir. 2008). Rather, a plaintiff may bring a Bivens claim against an offending actor  
 6 in his individual capacity. See Malesko, 534 U.S. at 72. As currently pled, plaintiff  
 7 has failed to allege whether his claims against defendants are made in their official  
 8 or individual capacities. As such, the defendants, as employees of the United States,  
 9 are immune from liability to the extent that they are sued in their official capacity.  
 10 As previously advised, plaintiff must specify whether he is suing defendants in their  
 11 individual capacity only. Plaintiff has failed to do so, and, as such, the Court cannot  
 12 conclude that the SAC states a viable cause of action.

13 Finally, plaintiff must exhaust his administrative remedies prior to filing a civil  
 14 rights action. See 42 U.S.C. § 1997e(a). The United States provides an  
 15 administrative remedy process through which BOP inmates may seek formal review  
 16 of an issue relating to any aspect of their confinement. See 28 C.F.R. § 542.10. In  
 17 order to exhaust available administrative remedies within this system, an inmate must  
 18 proceed through four levels of review, which includes an informal request, a formal  
 19 request, an appeal to the Regional Director, and finally an appeal to the General  
 20 Counsel. See 28 C.F.R. §§ 542.13-542.15. Plaintiff has not alleged that he exhausted  
 21 his administrative remedies through the BOP's administrative remedy process.  
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#### 23 **IV. The appointment of counsel**

24 The Court previously advised plaintiff that it was in the process of identifying  
 25 counsel willing to represent him in this matter. The Court has continued to attempt  
 26 to find counsel willing to represent plaintiff, at least in a limited capacity. However,  
 27 to date, the Court has been unable to identify such counsel. Once such counsel, if  
 28 any, has been identified, the Court will appoint the same.

1 **ORDER**

2 For the foregoing reasons, IT IS THEREFORE ORDERED as follows:

3 (1) Plaintiff's Motion to Seal the SAC and Affidavit is GRANTED. The  
4 Clerk is directed to file plaintiff's SAC and supporting Affidavit under seal.

5 (2) Plaintiff's Motion to Seal to the extent he requests an order prohibiting  
6 the dissemination of the SAC is DENIED without prejudice.

7 (3) Plaintiff's Motion for Permission is GRANTED. In the interest of  
8 protecting plaintiff's identity, prior to sending plaintiff a conformed copy of his SAC,  
9 the Court ORDERS plaintiff to notify the Court whether he still requests this copy  
10 within 15 days of the service date of this Order.

11 (4) Plaintiff's SAC is DISMISSED with leave to amend. Plaintiff's Third  
12 Amended Complaint shall be filed within 45 days of the service date of this Order.  
13 If plaintiff chooses to file a Third Amended Complaint, it should bear the docket  
14 number assigned in this case; be labeled "Third Amended Complaint"; and be  
15 complete in and of itself without reference to the original Complaint, the FAC, the  
16 SAC, or any other pleading, attachment or document. **Plaintiff is admonished that,**  
17 **if he fails to timely file a Third Amended Complaint, the Court will recommend**  
18 **that the action be dismissed with prejudice on the grounds set forth above and**  
19 **for failure to diligently prosecute.**

20  
21 DATED: September 23, 2011



22  
23 **THE HONORABLE DAVID T. BRISTOW**  
24 **UNITED STATES MAGISTRATE JUDGE**  
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